A

AHMAD SAIDI MD ISA

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ORS

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
HAIDAR MOHD NOOR JCA
C [CIVIL APPEAL NO: D-01-303-1996]
25 JANUARY 2006

CIVIL PROCEDURE: *Declaration - Application for - To declare appellant's restricted residence illegal - Restricted residence order having*
D *come to an end - Whether application for declaration academic - Whether court will act in vain or grant academic declaratory relief - Whether appellant estopped from attacking validity of restricted residence order in collateral proceedings*

E The Deputy Home Minister ('the Minister') had issued a warrant of arrest against the appellant under s. 2(i) of the Restricted Residence Act 1933 ('the Act') on 6 September 1994. On 20 September 1994, the appellant was arrested and brought to the Klang Police Station. Thereafter, he was sent to Pudu Prison
F where he was detained for another 30 days. On 19 October 1994, the Minister ordered that the appellant be detained for three months (effective from the date of the order) at Mukim Dabong, Kuala Krai, Kelantan. On 20 October 1994, the appellant was brought to the Dabong Police Station where he was detained
G thereat for several hours. Thereafter, the appellant was instructed to spend four nights at the house of OCS Sergeant Major Ismail before he was released at Mukim Dabong to commence his term of restricted residence thereat.

H Aggrieved, the appellant applied to the High Court to challenge his restricted residence at Mukim Dabong, claiming that it was illegal and void on the ground that his arrest and the other actions taken against him by the police immediately preceding his restricted residence were unlawful. The learned judge dismissed the appellant's summons and he appealed to the Court of Appeal.

I

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) Indeed, as pointed out by the senior federal counsel, this appeal was academic. The subject matter of the appeal was the correctness of the restrictive residence order, and that order has come to an end. There was, therefore, no longer a valid *lis* before the justices of appeal for adjudication. The court will neither act in vain nor grant academic declarations. (para 4)

(2) The dismissal of the appellant's appeal, however, should not estop (issue estoppel) him from challenging the said restrictive residence order in the subsequent criminal proceedings brought against him in the magistrate's court for allegedly having breached the conditions of his restrictive residence. In other words, the validity of the said restrictive residence order may yet be 'attacked' in collateral proceedings, *ie*, by way of defence to the criminal charges brought against him in the magistrate's court. (paras 5, 6, 7, 8 & 9)

[Order accordingly.]

Bahasa Malaysia *translation of headnotes*

Menteri Hal Ehwal Dalam Negeri telah mengeluarkan satu waran penangkapan terhadap perayu di bawah s. 2(i) Akta Kediaman Terhad 1933 ('Akta') pada 6 September 1994. Pada 20 September 1994, perayu telah ditahan dan dibawa ke Stesen Polis Klang. Selepas itu, beliau dihantar ke Penjara Pudu di mana beliau ditahan selama 30 hari. Pada 19 Oktober, Menteri memerintah bahawa perayu ditahan untuk tiga bulan (efektif dari tarikh perintah) di Stesen Polis Mukim Dabong, Kuala Krai, Kelantan. Pada 20 Oktober 1994, perayu telah dibawa ke Stesen Polis Dabong di mana beliau ditahan untuk beberapa jam. Kemudian, perayu telah diperintah untuk tinggal selama empat malam di rumah OCS Sarjan Mejar Ismail sebelum beliau dilepaskan di Mukim Dabong untuk memulakan tempoh kediaman terhad beliau di sana.

Terkilan, perayu telah memohon ke Mahkamah Tinggi untuk mencabar kediaman terhad beliau di Mukim Dabong, dengan mendakwa bahawa ia adalah menyalahi undang-undang dan tak sah kerana penangkapan beliau dan tindakan-tindakan lain yang

telah diambil terhadapnya oleh polis sebelum kediaman terhad beliau menyalahi undang-undang. Hakim yang arif telah menolak saman perayu dan beliau telah merayu ke Mahkamah Rayuan.

Diputuskan (menolak rayuan perayu)
Oleh Gopal Sri Ram HMR:

(1) Malah, seperti yang ditunjukkan oleh kaunsel persekutuan kanan, rayuan ini adalah akademik. Isi rayuan ini ialah ketepatan perintah kediaman terhad tersebut, dan perintah itu sudah berakhir. Oleh itu, tiada lagi *lis* sah di hadapan hakim rayuan untuk ditentukan. Mahkamah ini tidak akan bertindak bersia-sia atau memberi deklarasi akademik.

(2) Pembuangan kerja perayu, walau bagaimanapun, tidak patut estop (isu estoppel) beliau dari mencabar perintah kediaman terhad tersebut dalam prosiding jenayah berikut yang telah dibawa terhadapnya kerana beliau dikatakan telah mungkir syarat-syarat kediaman terhad beliau. Dalam kata-kata lain, kesahan kediaman terhad tersebut boleh 'diserang' dalam prosiding kolateral, *ie*, melalui pembelaan kepada tuduhan jenayah yang telah dibawa terhadapnya di mahkamah majistret.

[Diperintah sedemikian.]

Case(s) referred to:
Boddington v. British Transport Police [1999] 2 AC 143 ***(refd)***
Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 ***(refd)***
Re Barnato [1949] Ch 258 ***(refd)***

Legislation referred to:
Federal Constitution, art. 8(1)
Restricted Residence Act 1933, s. 2(i)

For the appellant - Haresh Mahadevan; M/s Aris Rizal Christopher Fernando & Co
For the respondents - Abdul Alim Abdullah (Mohd Abazafree Mohd Abbas with him)

[Appeal from High Court, Kota Bahru; Originating Summons No: 24-245-96]

Reported by Gan Peng Chiang

JUDGMENT

Gopal Sri Ram JCA:

[1] The facts of this case are fairly simple. On 6 September 1994, the Deputy Home Minister issued a warrant of arrest for the arrest of the appellant pursuant to s. 2(i) of the Restricted Residence Act (Chap 39). The appellant was arrested on 20 September 1994. He was taken to the Klang Police Station and then sent to Pudu Prison where he was detained for a further 30 days. On 19 October 1994, the Minister ordered that the appellant be detained for three months at Mukim Dabong, Kuala Krai, Kelantan effective from the date of the order. However the appellant was only brought to the Dabong Police Station on 20 October 1994 where he was detained for several hours. The appellant was then instructed to spend four nights at the house of the OCS, Sergeant Major Ismail before being released at Mukim Dabong, Kuala Krai, Kelantan to commence his term of restricted residence there.

[2] In a summons taken out before the High Court, the appellant challenged, by way of declaratory relief, his restricted residence at Mukim Dabong, Kuala Krai as being illegal and void on the ground that his arrest and the other action taken against him by the police immediately preceding his restricted residence were unlawful. That summons was dismissed by the learned judge. The appellant then appealed to us.

[3] When the appeal was called on for hearing, learned senior federal counsel for the respondent rose to his feet and very properly informed us that the restriction order made against the appellant was at an end and that the appeal was accordingly academic. Learned counsel for the appellant however argued that if the appeal were to be dismissed out of hand, his client would suffer injury as he was facing charges for having breached the restriction order. All that counsel wanted was some form of protection for his client that would not deprive him of a defence to the charges framed against him.

[4] We were entirely in agreement with learned senior federal counsel that the appeal was indeed academic. The subject matter of the appeal was the correctness of the restrictive residence order made against the appellant and to which he had been subject. That order having come to an end, there was no longer a valid lis before us for adjudication. Any views we may express about the

validity or otherwise of the order would be wholly academic in the circumstances of this case. It will simply have no effect at all. It will mean that we would act in vain. And it is settled law that a court will not act in vain. Equally is it also settled that the court will not grant academic declarations. See, *Re Barnato* [1949] Ch 258. There is therefore no alternative but to dismiss this appeal.

[5] But we equally recognised the need to ensure that the appellant will not suffer an injustice merely because his appeal is academic. The appellant's fear is that he will be deprived of a defence to the charges he is facing for having allegedly breached the order for restricted residence made against him. That difficulty will be sufficiently averted by ensuring that no point of issue estoppel is to arise against him by reason of the dismissal of this appeal. That is the rider we add to the order we made dismissing the appeal.

[6] We may add that the appellant need not have brought these proceedings at all. He could, in the criminal proceedings before the magistrate, have attacked the validity of the order made against him. As Abdoolcader J said in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon – in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v. Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729, 736, Diplock LJ (now a Law Lord) said (at p. 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
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> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' (*Birmingham (Churchwardens and Overseers) v. Shaw* [1849] 10 QB 868, 880; 116 ER 329 (at p. 880 per Denman CJ)). In *Barnard v. National*

Dock Labour Board [1953] 2 QB 18, 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (at p. 34 per Singleton LJ). *Ridge v. Baldwin* [1964] AC 40 is to the same effect.

[7] In *Boddington v. British Transport Police* [1999] 2 AC 143, Lord Slynn of Hadley said:

> that it is open to a defendant to raise in a criminal prosecution the contention that a byelaw or an administrative act undertaken pursuant to it is *ultra vires* and unlawful and that if he establishes that he has committed no crime. For magistrates to be required to convict when they are satisfied that an administrative act is unlawful is unacceptable.

[8] Likewise, we would say that it is consonant with promotion of the rule of law as enshrined in art. 8(1) of the Federal Constitution that the instant appellant be given an opportunity to challenge the validity of the administrative order made against him by way of defence to the criminal charges brought against him. See the speeches of Lord Irvine of Lairg LC and Lord Steyn in in *Boddington*'s case.

[9] For the reasons already given, the appeal was dismissed with the rider that the dismissal was not to estop the appellant from challenging the order in question in the proceedings before the magistrate's court.